Supreme Court, U.S.
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No. 93-512 MAR 24 1994

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE INDEPENDENT CORPORATION; GARY EARLES; BETTY DAVIS; JIM KEATON; MICHAEL F. MORAN,

Petitioners,

vs.

STATE OF OHIO, EX REL. JOHN ROSZMANN, Prosecuting Attorney for Fayette County, Ohio,

Respondent.

Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May this Court's holding in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), that the First and Fourteenth Amendments are neither offended nor implicated by the use of a state nuisance law to padlock a bookstore because of prostitution and other misconduct occurring on the premises which had nothing to do with the store's book-selling activities, be extended to a situation where a video arcade is padlocked under a state nuisance law based on inappropriate, but not criminal, conduct by some of the store's patrons, which conduct occurred in response to and while viewing videotapes protected by the First Amendment?

II. Is such a statutory scheme unconstitutional as applied under the First and Fourteenth Amendments for failing that part of the test set forth in United States v.

O'Brien, 391 U.S. 367 (1968), which requires employment of the remedy in furtherance of the law's goals that is least restrictive of First Amendment freedoms?

LIST OF PARTIES

The parties to the proceeding in the Ohio Supreme Court were Interstate Independent Corporation, Gary Earles, Betty Davis, Jim Keaton and Michael F. Moran as appellants, and the State of Ohio ex rel. John Roszmann, Prosecuting Attorney for Fayette County as appellee.

There are no parent or subsidiary companies of Interstate Independent Corporation.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

INTERSTATE INDEPENDENT CORPORATION;
GARY EARLES; BETTY DAVIS; JIM KEATON;
and MICHAEL F. MORAN

Petitioners,

vs.

STATE OF OHIO, EX REL. JOHN ROSZMANN,
Prosecuting Attorney of Fayette County,

Respondent.

Petition For Writ of Certiorari To
The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

Interstate Independent Corporation; Gary Earles, Betty Davis, Jim Keaton and Michael F. Moran, petitioners, pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court entered in this case on December 29, 1993.

OPINIONS BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth at A1. The judgment entry of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District is set forth at A3. The Opinion of the Twelfth Appellate District is set forth at A5-A39. The Final Judgment Entry of the Court of Common Pleas of Fayette County, Ohio is set forth at A40. Other judgment entries and orders of the Court of Common Pleas of Fayette County, Ohio are set forth at A49 and A52.

JURISDICTION

The opinion and judgment of the Court of Common Pleas of Fayette County, Ohio were entered on July 15, 1992. A40. The judgment of the Court of Appeals for Fayette

County, Ohio was entered on August 6, 1993. A3. The judgment of the Ohio Supreme Court was entered on December 29, 1993. A1. This Court has jurisdiction to review the judgment rendered by the highest court of a state by writ of certiorari, pursuant to 28 U.S.C. § 1257, where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and the Ohio Public Nuisance Statutes, Chapter 3767 et seq., are reprinted in the Appendix to this petition at A56 through A93.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to determine how far the principles enunciated in Arcara v. Cloud Books, 478 U.S. 697 (1986) should be extended. In Arcara, the Court reviewed a New York Court of Appeal's decision which had held that New York's public nuisance statute could not be constitutionally applied to close down an adult bookstore.

In Arcara, the activity precipitating the application of the nuisance statute included repeated instances of criminal misconduct such as the solicitation of prostitution. The State initiated a nuisance action which sought the full panoply of available statutory remedies, including temporary and permanent injunctions, complete closure for one year, and forfeiture and sale of all of the personal property and contents of the store that were used to

maintain and conduct the nuisance. The trial court rejected the bookstore's argument that the First Amendment prevented application of the statute's closure remedies and the appellate division affirmed.

The New York Court of Appeals analyzed the application of the statute to the bookstore under the First Amendment principles set forth in United States v. O'Brien, 391 U.S. 367 (1968). Applying those principles, the court found that while the goals, means and purpose of the nuisance statute were constitutionally permissible, the closure remedy could not be constitutionally applied to the adult bookstore because the remedy was much broader than was necessary to achieve the statute's goals. It went on to find that other, less restrictive alternatives, that would not unduly inhibit the store's book selling activities, were available for achieving the statute's goal

of preventing illicit commercial sexual activity. See 478 U.S. at 701-02.

This Court reversed the New York Court of Appeals decision. In doing so, this Court did not question the conclusion reached when applying the O'Brien analysis, but rather, found O'Brien was not applicable to those facts. In reaching that conclusion, this Court noted the O'Brien analysis was applicable only to those situations where the conduct being regulated was inextricably intertwined with speech. 478 U.S. at 703-04. It gave as examples the circumstances presented by O'Brien itself, which involved the prosecution of the petitioner after he burned his draft card in an attempt to convey a message protesting the draft, as well as those presented by Clark v. Community for Creative Non-Violence, 486 U.S. 288 (1984)(petitioner prosecuted for sleeping in public park

to protest the plight of the homeless), and United States v. Albertini, 472 U.S. 675 (1985) (barring protester from entering military base), among others. The Court then reviewed the conduct presented in Arcara and determined that such conduct was not speech and was not conduct intermingled with speech. Rather, it found the occurrence of criminal misconduct having nothing to do with speech, 478 U.S. at 706-07, and held O'Brien was not applicable because

> [t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Book selling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.

478 U.S. at 707.

This case raises the question whether the First Amendment requires strict scrutiny, in accordance with the four-part a-

nalysis set forth in United States v. O'Brien, 391 U.S. 367 (1968), of a state nuisance statute's application to a video arcade that disseminates constitutionally protected expression, where the conduct precipitating the application of the statute was inextricably intertwined with the constitutionally protected expression being disseminated therein, and where the one year closure and forfeiture remedies mandated by the statute impose a restriction on First Amendment freedoms far greater than is essential to the furtherance of the statute's goals. Simply put, this case questions the limits of the Arcara principles in situations where speech plus conduct are inextricably intertwined.

This is one of a growing number of cases in which the State of Ohio, in reliance upon this Court's decision in Arcara v. Cloud Books, has applied its Public Nui-

sance Act[1] to completely shut down adult bookstores on the ground that "lewdness" has occurred on the premises. Petitioners herein contend the holding of Arcara should not be extended to a situation where the nuisance statute is applied to close down an adult establishment in which, in response to viewing protected expression, patrons have engaged in noncriminal sexual misconduct such as masturbation, within the closed doors of video viewing booths.

Review of the constitutionality of the application of Ohio's Public Nuisance Act under these and similar circumstances presents this Court with an opportunity to illuminate the analysis appropriate to this confused, conflicting and reoccurring issue. Similar cases are being filed all over

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[1] Ohio's statute, which is reprinted in the Appendix attached hereto, can find its clone in at least 19 other jurisdictions.

the country, and the urgency of the need for direction from this Court draws intensity from the fact that concededly protected expression has been and continues to be completely suppressed under the guise of utilizing Arcara to apply nuisance statutes to close down adult entertainment establishments absent analysis under the First Amendment.

In this case, the prosecuting attorney of Fayette County, Ohio, filed an action pursuant to Chapter 3767 of the Ohio Revised Code on March 13, 1992, alleging that a bookstore known as the Lions Den[2] and a neighboring video arcade known as the Interstate Adult Arcade constituted a nuisance on the ground that "lewdness" was oc-

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[2] The Complaint against the Lions Den was ultimately dismissed because the court found it was not a nuisance. See Judgment Entry Granting Permanent Injunction And Order of Sale at A40, A43-44.

curring on the premises. On March 25, 1992, an amended Complaint was filed which joined additional parties alleged to be liable for maintaining the nuisance.

The nuisance abatement action followed an investigation launched by the respondent to ascertain whether sexual activity was occurring on the premises of the Interstate Adult Arcade. However, no criminal or any other kind of complaint of on-site sexual activity had ever been lodged against the Arcade or its patrons. Similarly, none of the materials being disseminated by the Arcade were alleged to be obscene.

The Interstate Independent Arcade consisted of an entrance area where the cashier was located, a game and vending area, and an area where the arcade booths were located. The Arcade area contained 32 viewing booths and each booth was equipped with a bench, a menu of sexually explicit

videos and a coin-activated monitor for viewing the videos. The video monitors in the booths would not operate unless the booth's door was closed and locked.

During the two month investigation, government agents repeatedly entered the Arcade for the purpose of gathering evidence of inappropriate sexual activity. Specifically, at least four undercover government agents entered the Arcade, without a warrant, on five separate occasions. Upon entering the Arcade, the agents, like all patrons, were required to approach a desk where an employee checked for membership cards. If the agent did not have a membership card, he was required to purchase a membership for a small fee.

The agents entered between five and ten video booths on each visit, but never saw any inappropriate sexual misconduct. Rather, the agents entered the video booths and

collected evidence, generally in the form of used tissues, that they believed would demonstrate the presence of semen, and ultimately lead to the conclusion that the arcade's patrons were participating in inappropriate sexual activity within the confines of the video booths. During these entries, the agents seized what they thought was evidence of the presence of semen in only six of 25 to 50 booths they entered.

Based on this evidence, the respondent filed a complaint against petitioners and others in the Common Pleas Court, Fayette County, Ohio, which alleged the Interstate Independent Arcade was a nuisance subject to abatement pursuant to Chapter 3767 of the Ohio Revised Code on the ground that it was a place where lewdness occurred. Pursuant to § 3767.04 of the Ohio Revised Code, the trial court issued an ex parte

temporary restraining order which prohibited the petitioners from removing or in any manner interfering with the personal property and contents located within the premises, see Temporary Restraining Order, A52, and set the matter for a temporary injunction hearing within ten days of the filing of the complaint.

Petitioners were served with amended Complaints, restraining orders and various other documents just days before the temporary injunction hearing was held. At the temporary injunction hearing and at every conceivable opportunity thereafter, the petitioners raised a number of objections to the complaints and the proceedings in general, both constitutional and otherwise, including that as applied to petitioners, Ohio's public nuisance statute is unconstitutional. Specifically, petitioners claimed there and claim now that the First

Amendment is applicable to a situation such as this because, unlike the situation in Arcara v. Cloud Books, the conduct herein at issue occurred while patrons were in the process of viewing constitutionally protected expression, and therefore their conduct was inextricably intertwined with expression protected by the First Amendment. Petitioners also argued that even if a nuisance was found to exist, the First Amendment required the court to tailor its application of the statutory remedies such that they were the least intrusive on petitioners' continued dissemination of protected expression.

Relying on Arcara v. Cloud Books and the Ohio Supreme Court's decision in State ex rel. Miller v. Rear Door Bookstore, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992), the trial court rejected petitioners' arguments, refused to employ a First Amendment analysis

and, after hearing the evidence, granted most of respondent's requests for relief. Specifically, and pursuant to Ohio Rev. Code § 3767.04, the trial court issued a temporary injunction on April 10, 1992 which ordered closure of the entire premises for all purposes. See Judgment Entry at A49. Thereafter, the trial court issued a final judgment on July 15, 1992 which declared the entire Interstate Adult Arcade a nuisance, and, pursuant to Ohio Rev. Code § 3767.06, ordered a permanent injunction abating said nuisance, ordered the entire premises closed for one year, and ordered forfeiture and sale of all personalty located in the Arcade. See Judgment Entry Granting Permanent Injunction and Order of Sale at A40.

Petitioners appealed the trial court's judgment to the Court of Appeals for Fayette County. Petitioners raised five sepa-

rate assignments of error in the court of appeals, including that the trial court erred in failing to find the nuisance statute, as applied to these petitioners, violated the First Amendment to the United States Constitution. See Opinion of the Court of Appeals, A5, A10-11.

On August 6, 1993, the appellate court, relying on Arcara v. Cloud Books, affirmed the trial court's judgment, holding the First Amendment did not apply to the circumstances of this case. See Judgment Entry of the Court of Appeals at A3-4.

Petitioners requested the Ohio Supreme Court to hear a further appeal, however, on December 29, 1993, that court declined to exercise its jurisdiction. See Entry of the Ohio Supreme Court, A1.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to address a question left open by Arcara v. Cloud Books. Specifically, petitioners ask this Court to decide whether a First Amendment analysis must be utilized to determine whether a state regulation can be constitutionally applied to completely close down a video arcade where unidentified patrons, in response to viewing constitutionally protected expression, engaged in masturbation within the privacy of the video arcade's viewing booths.

The question presented here is unlike that addressed in Arcara v. Cloud Books because here, unlike Arcara, the offensive conduct, i.e., masturbation by unidentified arcade patrons within the confines of the video viewing booths, was not criminal conduct and did not occur in public, but "was

intimately related to expressive conduct protected under the First Amendment." Arcara, 478 U.S. at 707 n.3, 106 S.Ct. at 3177 n.3 (emphasis added) (citations omitted). Moreover, the conduct here, as noted by Justice Blackmun in his Arcara dissent, was "spurred by the [videotapes being viewed] by browsing customers." Arcara, 478 U.S. at 711 n.*, 106 S.Ct. at 3172, 3179 n.* (emphasis added)(Blackmun, J. dissenting).

In Arcara v. Cloud Books, 478 U.S. 697 (1986), this Court addressed whether the First Amendment was offended by application of a New York statute authorizing closure of a building for being a public health nuisance, to an adult bookstore where criminal activity such as prostitution and other public, sexual conduct between patrons was occurring. 478 U.S. at 699. This Court held the First Amendment was not

applicable because the nuisance statute "was directed at unlawful conduct having nothing to do with books or other expressive activity" found within the store. Id. at 706. Rather, the underlying conduct which served as the basis for the closure order--namely, prostitution--had absolutely no relation to or connection with the bookstore's expressive activity. Id. at 699. Thus, application of the statute to the bookstore was constitutional since closure was necessary to prevent prostitution, a criminal act which neither raised nor implicated expression protected by the First Amendment. Id. at 707. Arcara thus stands for the proposition that a regulation aimed at and applied to conduct having nothing to do with speech, does not implicate the First Amendment and may be utilized to close down a place where expressive activity occurs. See also Alexander v. United

States, ___ U.S. ___, 113 S.Ct. 2766, 2774-75 (1993).

In Arcara, however, this Court acknowledged that United States v. O'Brien, 391 U.S. 367 (1968), continues to stand as controlling authority for the level of scrutiny to which a governmental regulation of conduct must be subjected when the regulation has the incidental effect of burdening protected expression if "the 'nonspeech' which drew [the] sanction was intimately related to expressive conduct protected under the First Amendment." Arcara, 478 U.S. at 707 n.3, 106 S.Ct. at 3177 n.3 (citation omitted) (citing Grayned v. City of Rockford, 408 U.S. 104 (1972); Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940)). See also Alexander v. United States, ___ U.S. ___, 113 S.Ct. at 2775.

In O'Brien, the defendant was charged with burning his draft card pursuant to a statute which did not, on its face, implicate expressive activity. This Court noted, however, that O'Brien burned his draft card in an attempt to convey a message protesting the draft. 391 U.S. at 369-70. Thus, the Court recognized that the defendant had engaged in a form of criminal conduct that was inextricably intertwined with constitutionally protected expression, and because of the intermingling, ruled the statute's application to O'Brien was subject to strict scrutiny to determine whether it was the least restrictive alternative to achieving the statute's goals. 391 U.S. at 376-77.

In O'Brien, this Court held the statute could be constitutionally applied to the defendant. In reaching this conclusion, however, this Court determined that a gov-

ernmental regulation affecting conduct not necessarily possessing an expressive element but which occurs in combination with protected expression, must be strictly scrutinized to assure it is narrowly tailored so that any incidental restriction on First Amendment freedoms is "no greater than is essential to the furtherance of [the regulation's goal]." Id. at 377. Thus, O'Brien continues to stand for the proposition that a First Amendment analysis must be utilized to test the application of a statutory scheme, which on its face is designed to regulate conduct not protected by the First Amendment, to conduct completely entangled with expressive activity protected by the First Amendment, and for the further proposition that the statutory scheme must be struck down as an unconstitutional infringement upon First Amendment rights if its application results in the

imposition of sanctions unduly restricting and inhibiting the expressive activity. See also Alexander v. United States, ___ U.S. ___, 113 S.Ct. at 2775; Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); United States v. Albertini, 472 U.S. 675 (1985); Barnes v. Glen Theater, Inc., _____ U.S. _____, 111 S. Ct. 2456 (1991).

The Court cited several examples of situations where O'Brien was appropriately applied. For instance, in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), the Court applied the O'Brien analysis to determine the constitutionality of a ban on camping in a public park to demonstrators who sought to sleep there as a protest of the plight of the homeless. 478 U.S. at 704. In United States v. Albertini, 472 U.S. 675 (1985), O'Brien was utilized to test the constitutionality of

a protestor's conviction for trespassing on the grounds of a military base from which he had been barred as a result of previous improper conduct. 478 U.S. at 704. In each of those cases, the Court applied the O'Brien analysis but upheld the constitutionality of the statute since all four parts of the O'Brien test had been satisfied.

In explaining these decisions, the Court noted:

> we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in O'Brien, or where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star.

478 U.S. at 706-07. See also Alexander, ___ U.S. ___, 113 S.Ct. at 2775.

This case presents the Court with the situation, referred to in Arcara, where the

nonspeech conduct which drew the statutory sanction, is intimately associated with the protected speech being disseminated within the bookstore. Absent the dissemination of constitutionally protected expression, the nonspeech conduct would not have occurred.

Here the conduct at issue occurred while patrons were viewing sexually explicit expression within the confines of video booths. The conduct was not of a criminal nature, did not occur in the open, and in fact was only discovered when investigators collected used tissues and/or swabbed wet spots from the floors of the arcade's booths. Thus, the conduct here was not even remotely similar to that involved in Arcara. Rather, the sexual misconduct alleged herein occurred in the privacy of a closed viewing booth while unidentified patrons viewed sexually explicit videotapes protected by the First Amendment. Simply

put, absent the dissemination of constitutionally protected expression, the conduct sought to be averted simply would not have existed. Thus, unlike Arcara, First Amendment activity is implicated in the case at bar, and in fact, is "intimately connected to the behavior the law enjoined."

Because of the circumstances presented herein, petitioners contend the courts below were required to analyze the application of Ohio's nuisance statute to this case under the appropriate First Amendment standard of review set forth in O'Brien. Petitioners further contend that application of a First Amendment analysis to the statute will result in the conclusion that the statute is unconstitutional as applied to the Interstate Adult Arcade because the closure remedy mandated by the statute is not the least restrictive alternative a-

vailable for achieving the statute's goals. Rather, the sanctions mandated by this statute impose an undue restriction on protected First Amendment freedoms.

Both of the lower courts rejected the First Amendment analysis sought by petitioners finding instead, based on Arcara, that the First Amendment is not implicated by this set of facts. However, if, as petitioners contend, the First Amendment is applicable, it is clear that closing the Arcade was excessive and far beyond what was needed to eliminate any nuisance that may have existed.

Other cities and, indeed, other states that have dealt with similar kinds of patron misconduct have had no trouble creating alternative avenues for ridding their communities of inappropriate sexual misconduct in video booths. In fact, many communities have passed, and the courts have

upheld, what is known as an "open booth" ordinance, which generally requires removal of the doors from the video booths, as well as increased lighting and an unobstructed view of the booth from the sales clerk's station. See for instance Wall Distributors Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); Bamon Corp. v. City of Dayton, 923 F.2d 470, 474 (6th Cir. 1991); Berg v. Health and Hospital Corp., 865 F.2d 797, 802 (1989); Movie & Video World v. Bd. of County Commiss., 723 F. Supp. 695, 703 (S.D. Fla. 1989); Doe v. City of Minneapolis, 693 F. Supp. 774, 780 (D.Minn. 1988). In any event, many alternatives are available which are less restrictive than preventing the sale of constitutionally protected expression for an entire year.

Petitioners do not contend the free speech guarantees embodied in the Consti-

tution of the United States shield them against any form of governmental regulation. Rather, petitioners recognize that the occurrence of criminal sexual misconduct totally unrelated to the dissemination of constitutionally protected expression may provide the basis for closure, pursuant to a state nuisance statute, of a video arcade or any other place at which First Amendment or other protected activities occur, without offending the Constitution of the United States. Importantly, however, the decision in Arcara did not address whether a First Amendment analysis would be applicable to a situation such as this, where the viewing of constitutionally protected expression was inextricably intertwined with the patron conduct deemed opprobrious. Thus, since the viewing of constitutionally protected expression herein, unlike Arcara, was inextricably intertwined

with the patron conduct herein deemed opprobrious, petitioners assert the full panoply of free speech protections are applicable.

As such, petitioners contend the analysis required by the Court's holding in O'Brien should be applied to this situation, and that the statute's application to the Interstate Adult Arcade and others similarly situated should be held unconstitutional.

CONCLUSION

Based upon all of the foregoing, petitioners respectfully urge this Court to accept this case for review.

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THE SUPREME COURT OF OHIO

1993 TERM

To wit: December 29, 1993

STATE OF OHIO, ex rel. John Roszmann, Prosecuting Attorney for Fayette County, Appellee,	:	Case No. 93-1980
v.	:	E N T R Y
Lions Den	:	
[Gary Earles et al., Appellants.]	:	

Upon consideration of the motion for an order directing the Court of Appeals for Fayette County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Berkman, Gordon, Murray, Palda & DeVan.

(Court of Appeals No. CA9208015)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, ex rel. JOHN ROSZMANN, Prosecuting Attorney for Fayette County	:	Case No. CA92-08-015
Plaintiff-Appellee	:	JUDGMENT ENTRY
v.	:	
LIONS DEN, et al.	:	(Filed August 6, 1993)
Defendants-Appellants	:	

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

To all of which appellants, by their counsel, except.

Richard N. Koehler,
Presiding Judge

William W. Young,
Judge

James E. Walsh,
Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, ex rel. JOHN ROSZMANN, Prosecuting Attorney for Fayette County	:	Case No. CA92-08-015
Plaintiff-Appellee	:	O P I N I O N 8/9/93
v.	:	
LIONS DEN, et al.	:	(Filed August 6, 1993)
Defendants-Appellants	:	

Steven H. Eckstein, Fayette County Prosecuting Attorney, James B. Grandey, 214 West Market Street, Washington C.H., Ohio 43160, for plaintiff-appellee.

Berkman, Gordon, Murray, Palda & DeVan, J. Michael Murray, Lorraine R. Baumgardner, and Jeremy A. Rosenbaum, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, for defendants-appellants.

YOUNG, J. Defendants-appellants, Interstate Independent Corp., Michael F. Moran, Jim Keaton, Betty Davis, and Gary Earles, appeal a judgment of the Fayette County Court of Common Pleas finding the Inter-

state Adult Arcade ("the Arcade"), 9017 West Lancaster Road, Jeffersonville, Ohio, a nuisance as defined in R.C. 3767.01.

Undercover officers from the Fayette County Sheriff's Department and the South Central Task Force visited the Arcade on several occasions from January 1992 through March 1992. Upon entering the facility, the officers encountered a desk where an employee checked membership cards. During their initial visit, the investigators obtained a membership after producing identification, signing a form and paying a one dollar fee. Also located in the entrance area are a change machine and a cashier.

The remainder of the facility's physical layout consists of a game and vending area and an arcade area. The arcade area contains thirty-two viewing booths. Each

booth is equipped with a bench, a menu of sexually explicit videos, and a coin-activated monitor for viewing the videos. The video monitors operate only if the booth's door is closed and latched.

During their visits to the Arcade, the officers collected used tissues, paper towels and a used condom from the floor of various booths. Also, an officer used a cotton-tipped swab to collect a sample of a white substance he observed in one of the booths. Forensic testing of the tissues and paper towels revealed the presence of semen and pubic hairs. The condom and the cotton swab also contained traces of semen. In addition, the officers observed what appeared to be dry semen stains on the walls, floors and video monitors of the

booths. Use of a blacklight confirmed the presence of these stains.

The officers reported that the area was not particularly clean and that the floors of the booths were "sticky." They also described the presence of employees referred to as "cleaners" who wore rubber gloves, swept and mopped the floors and collected paper towels and tissues from the booths and adjoining hallway.

The Arcade has no retail merchandise available for sale; however, all sexually explicit videos shown in the Arcade are sold in the Lion's Den Adult Bookstore, located in a separate structure adjacent to the Arcade. The Lion's Den Adult Bookstore is not involved in this appeal.

Plaintiff-appellee, John Roszmann, former Fayette County Prosecuting Attorney,

filed a nuisance complaint against the owners and operators of the Arcade pursuant to R.C. Chapter 3767 on March 13, 1992. The complaint alleges that the Arcade is a public nuisance as "lewdness, assignation or prostitution is conducted, permitted, continued or exists" on the premises. As the case progressed, the trial court denied appellants' motions for dismissal and suppression of evidence. Thereafter, the court heard evidence on the state's motions for temporary and permanent injunctions. The court issued a temporary injunction on April 10, 1992 and a permanent injunction on July 15, 1992. The final order enjoins appellants from conducting a nuisance at the Arcade, orders the Arcade closed for one year and requires the sale of all per-

sonal property used in conducting the nuisance.

On appeal, appellants raise five assignments of error:

Assignment of Error No. 1:

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS, IN UPHOLDING THE CONSTITUTIONALITY OF CHAPTER 3767 AS APPLIED TO THIS CASE AND IN GRANTING RELIEF IN THE FORM OF THE CLOSURE OF A PRIVATE ARCADE AND THE FORFEITURE OF PERSONALTY, *** WHERE THE ONLY EVIDENCE INTRODUCED AGAINST APPELLANTS WAS THAT IN RESPONSE TO VIEWING NON-OBSCENE, CONSTITUTIONALLY PROTECTED MATERIALS EXHIBITED IN PRIVATE BOOTHS AT THE CLUB, SOME MEMBERS ENGAGED IN MASTURBATION.

Assignment of Error No. 2:

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR, AND IN FINDING APPELLANTS LIABLE *** WHERE THE EVIDENCE INTRODUCED AGAINST APPELLANTS, THAT A SMALL PERCENTAGE OF MEMBERS ACTED IN A MANNER CONTRARY TO THE CLUB'S RULES AND POLICIES, WAS INSUFFICIENT, AS A

MATTER OF LAW, TO IMPOSE LIABILITY ON APPELLANTS UNDER CHAPTER 3767.

Assignment of Error No. 3:

THE TRIAL COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING AND TO SUPPRESS EVIDENCE SEIZED FROM THE INTERIOR OF A PRIVATE CLUB *** WHERE THAT EVIDENCE WAS SEIZED, WITHOUT A PARTICULARIZED WARRANT ISSUED UPON PROBABLE CAUSE, BY UNDERCOVER OFFICERS WHO ACTED OVER AN EXTENDED PERIOD OF TIME WITH AN INVESTIGATORY PURPOSE AND NOT AS PATRONS WOULD BE EXPECTED TO ACT.

Assignment of Error No. 4:

THE TRIAL COURT ERRED IN CLOSING THE ARCADE FOR ANY PURPOSE AT THE TEMPORARY INJUNCTION STAGE OF THE PROCEEDINGS ***.

Assignment of Error No. 5:

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT AND IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR *** ON THE GROUND THAT THE DEFINITIONAL AND LIABILITY PROVISIONS OF CHAPTER 3767 ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

I.

Within their first assignment of error appellants present two issues for review. First, appellants argue that R.C. Chapter 3767 is unconstitutional as applied in the present case because the conduct underlying the nuisance action is "inextricably intertwined" with expression protected by the First Amendment and because the sanctions imposed by the trial court are not narrowly tailored to avoid an undue restriction of First Amendment rights. We do not agree.

Appellants' argument is premised upon the theory that the "least restrictive means" test announced by the United States Supreme Court in United States v. O'Brien (1968), 391 U.S. 367, 88 S.Ct. 1673, applies in the present case. In O'Brien, the Supreme Court determined that government

regulation of conduct having an expressive element is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377, 88 S.Ct. at 1679. Appellants focus on the last prong of the test, contending that the sanctions imposed by the trial court are not narrowly tailored and are "greater than [are] essential" to furthering the state of Ohio's governmental interest in protecting against public nuisances.

Appellants' O'Brien analysis is flawed, however, as is clearly demonstrated by the United States Supreme Court's decision in Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697, 106 S.Ct. 3172. In that case, an adult bookstore was closed after an undercover investigation revealed that masturbation, fondling, fellatio, and solicitation of prostitution occurred on the premises. The Supreme Court rejected the bookstore owners' argument that O'Brien applied, explaining that "least restrictive means" scrutiny applies only to those criminal and civil sanctions "where it was conduct with a significant expressive element that drew the legal remedy in the first place" or "where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged

in expressive activity." Id. at 706-07, 106 S.Ct. at 3177. The Court ultimately determined that the sexual activity in O'Brien [sic] [Arcara] "manifest[ed] absolutely no element of protected expression" and that the statute at issue failed to "single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden." Id. at 705, 106 S.Ct. at 3176.

In the present case, neither justification for "least restrictive means" scrutiny exists. Like the sexual activity in Arcara, the sexual activity found to occur in the Arcade contains no significant element of expression protected under the First Amendment. "Masturbation is not so inextricably bound up with the display of adult videotapes and movies that the con-

duct cannot be regulated separately from the protected speech." State ex rel. Ward v. Lion's Den (June 3, 1993), Ross. App. No. 1874, unreported at 5. The Supreme Court of Ohio has also held that sexual activity in an adult bookstore does not involve elements of protected expression. See State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals (1992), 63 Ohio St.3d 354. Additionally, R.C. Chapter 3767, Ohio's nuisance legislation, does not have the inevitable effect of singling out expressive activity, as it forbids "lewdness, assignation, or prostitution," as did the statute in Arcara. See R.C. 3767.01(C). R.C. Chapter 3767 "prohibits only conduct, not expression." State ex rel. Miller v. Private Dancer (1983), 83 Ohio App.3d 27, 32. Because the present case does not in-

volve expressive conduct or a statute which effectively singles out expressive activity, the O'Brien test does not apply and we need not address the trial court's sanctions in that context.

In their second issue presented for review, appellants contend that the trial court's forfeiture order, which directed that all "personal property located at the Interstate Adult Arcade including, but not limited to, all video cassette recorders, all television monitors, all booths, all wiring and any and all other personal property used in the conduct and maintenance of the nuisance" be sold, was unlawful because the state presented no evidence that the personal property was connected with the nuisance action. We do not agree.

R.C. 3767.06(A) authorizes the removal and sale of "all personal property and contents used in conducting or maintaining the nuisance." Upon review of the record, we are convinced that the equipment specifically identified by the trial court was proven to be used in the conduct and maintenance of the nuisance found to be present at the Arcade. Appellants fail to identify any equipment which was removed from the Arcade for sale which was not used in conducting or maintaining the nuisance. Initially, the court's order encompassed a snack vending machine, a soda vending machine and a pinball machine which had no connection to the sexual activity occurring on the premises. However, the court subsequently allowed the owner of the vending and pinball machines to remove them from

the Arcade. Once the vending and pinball machines were exempted from the court's order of sale, it appears that the video equipment and booths constituted the remaining personal property to be sold, as nothing in the record indicates otherwise. Again, the record contains sufficient evidence to justify the sale of that equipment.

Appellants' second issue presented for review is overruled, as is their first assignment of error.

II.

In their second assignment of error, appellants also raise two issues for review. First, appellants contend that the state failed to prove that "lewdness" under R.C. 3767.01(C) existed at the Arcade. We do not agree.

The term "nuisance" is defined in R.C. 3767.01(C). That section states in pertinent part as follows:

> (C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists ***.

In arguing that the state did not establish the existence of "lewdness" at the Arcade, appellants rely on the definition of that term announced in Rear Door:

> [5] The common definitions of "lewd" clearly demonstrate that there are activities of a sexual nature which are beyond the limits of what society deems tolerable. We recognize this proposition is tempered by an established right of privacy which generally provides that what two consenting adults do in private is their own concern. Paris Adult Theatre I v. Slaton, supra. By necessary implication, R.C. 3767.01 may only be applied to instances of public activity which

> are unprotected. In Arcara and Paris Adult Theatre I, the United States Supreme Court held that the right of privacy does not apply to sexual activity in a commercial theatre or bookstore open to the public at large. Since there was evidence of peepholes between booths and patrons leaving doors open, presumably for their own voyeuristic gratification, or for the purpose of enticing a second participant, the right of privacy is equally inapplicable to this case. See People v. Adult World Bookstore (1980), 108 Cal. App.3d 404, 166 Cal.Rptr. 519.
>
> In summary, we conclude that the term "lewdness" is not void for vagueness. The word describes a public sexual activity that is reprehensible or disgusting in nature.

Rear Door, supra, at 360.

Appellants essentially argue that the "'closed door' misbehavior by patrons" in this case does not "constitute 'public [sexual] activity'" because the state presented no evidence of peepholes between booths or of patrons leaving doors open. We

agree that the state did not present such evidence, but after examining evidence of the physical structure of the booths in the Arcade, we find that the sexual activity proven to occur therein was public sexual activity.

In the previously quoted passage from Rear Door, the court utilizes privacy principles to conclude that "lewdness" includes only instances of public activity. The inverse of the court's rationale is equally correct. That is, "lewd" public sexual activity must occur in a place where no right of privacy exists.

It is evident from photographs and a videotape of the Arcade that the individual booths resemble public restroom stalls. Neither the partitions separating the booths nor the doors to the booths reach

the floor. Although the dimension of the open space is not known, it is clear that the space is sufficient for a passerby to at least in part observe the activities of a patron or patrons inside an individual booth. Because the partitions between the booths do not reach the floor, a patron in one booth could conceivably at least in part observe the activities of patrons in adjoining booths. Also, the booths are not constructed of metal as in most public restrooms. They are instead constructed of thin sheets of pressboard.

Because the booths in the Arcade and public restroom stalls are structurally similar and because both are partitioned spaces within a place accessible to the public, we find that the cases analyzing the right of privacy in public restroom

facilities are applicable.[1] We are particularly persuaded by two court of appeals decisions. First, in State v. Million (1989), 63 Ohio App.3d 349, the court addressed the issue in the context of a voyeurism conviction, concluding that "an occupant of a public restroom has no reasonable expectation of privacy concerning

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[1] Appellants argue that the Arcade itself is a private club because a membership card must be produced to enter the facility. However, the evidence presented in the lower court indicates that the only requirements for "membership" at the Arcade are that the patron pay a one dollar fee, sign a form, and be eighteen years of age. At least two officers testified that upon entering the Arcade employees simply asked them to sign the "membership application." The officers were not required to read the application. These facts indicate that the Arcade is accessible to any adult paying the one dollar entrance fee. Therefore, we find that the Arcade is truly a public place.

what can be seen below the level of the stall partition." Id. at 351.

Second, in State v. Tanner (1988), 42 Ohio App.3d 196, the court addressed the issue in the context of the Fourth Amendment's protection against unreasonable searches and seizures. The Tanner court identified two elements that must exist to support the conclusion that a person has a reasonable expectation of privacy. "First, the individual 'must have a subjective expectation of privacy; and, second, *** [the] expectation must, as an objective matter, be one that society is prepared to recognize as reasonable.'" Tanner at 197, quoting United States v. Brown (6th Cir. 1980), 635 F.2d 1207, 1211. The court in Tanner ultimately concluded that an individual cannot reasonably expect privacy

when using a public restroom stall for a purpose other than that which the stall was intended. Accordingly, no privacy could reasonably be expected with regard to sharing the stall with another individual.

Applying these privacy principles in the present case, we are convinced that patrons of the Arcade have no reasonable expectation of privacy while inside one of the Arcade's booths if they utilize the booth for sexual activity. Million supports this conclusion as to what can be observed below the doors and partitions of the booths. Employing their senses and experience in combination with what can be observed beneath the booth doors and partitions, most adults could ascertain whether sexual activity was taking place inside one of the booths. The present case also fails to pass

muster under the second prong of the Tanner test. This court finds that society is not prepared to tolerate an expectation of privacy legitimizing sexual activity in a partially enclosed booth within an arcade accessible to the public, especially in light of the health concerns involved.

To summarize, we conclude that patrons of the Arcade who utilized the booths in the facility for sexual activity have no legitimate expectation of privacy while inside the booths. Because the sexual activity in the present case occurred within areas where no right of privacy existed, the activity was "public" for purposes of the Rear Door definition of lewdness. The state presented sufficient evidence that patrons engaged in sexual activity while inside the booths. Therefore, the state

provided sufficient proof that "lewdness," or "public sexual activity that is reprehensible or disgusting in nature," existed at the Arcade. Accordingly, we reject the first argument set forth under appellants' second assignment of error.

In their second issue presented for review, appellants argue that there was an insufficient showing of culpability under R.C. Chapter 3767 to justify sanctions in the present case. Appellants contend that they, the owners and employees of the Arcade, cannot be held responsible for the acts of their patrons. We do not agree.

R.C. 3767.02 establishes the standard for culpability in a nuisance action:

> Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together

> with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance ***.

Based on the facts of the present case, the standard of culpability herein is any person who aids or abets in the conduct of a nuisance is guilty of maintaining a nuisance.

In Rear Door, supra, the court applied this standard of culpability. That court found the following evidence established that the owners and operators of the Rear Door Bookstore aided and abetted a nuisance therein: (1) customers had to purchase tokens from an employee to operate the movie projectors (so the employee was aware that the customer was about to use the arcade); (2) semen stains found on the booths were visible to the naked eye; and

(3) tissues and wastebaskets were provided in each booth which presumably had to be restocked and emptied, thereby alerting employees to the presence of debris in the booths.

The record in the present case contains similar evidence that appellants aided and abetted the sexual conduct of the Arcade's patrons. All patrons of the Arcade had to check in with an employee at the entrance of the facility. Several witnesses testified that semen stains were visible in the booths without the aid of a blacklight. Also, the Arcade employed "cleaners" instructed to clean the booths and to collect used paper towels and tissues. One Arcade employee even testified that outside trash receptacles were kept locked "to keep the sheriff's department out" and that the

"cleaners" were told to rid the booths of semen to frustrate a possible police investigation. That employee further testified that her supervisors and the operators of the Arcade instructed her to prevent sexual activity from taking place outside the booths by requiring patrons to "take it to a booth or leave." We conclude that this evidence more than adequately establishes that appellants aided or abetted a nuisance, the sexual conduct of their patrons. Thus, appellants' culpability argument fails. Because we have rejected both arguments comprising appellants' second assignment of error, that assignment is overruled.

III.

In their third assignment of error, appellants contend that the trial court

erred in failing to suppress the evidence seized from the Arcade by undercover officers as that evidence was confiscated without a warrant. We do not agree.

This issue has been addressed by the court in Rear Door, supra. In that case, the court found that the seizure of tissues and condoms from the video booths in the Rear Door Bookstore was lawful because the bookstore owners and operators had no expectation of privacy in the area of the bookstore where the evidence was gathered. The court also determined that the search was lawful under the plain view doctrine. The court's analysis in Rear Door is directly applicable to the present case:

> The Fourth Amendment applies to searches and seizures. "**** A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.

**** United States v. Jacobsen (1984), 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94. In the present case, the undercover deputies entered a part of appellants' place of business that was open to any adult member of the public. In that situation, there can be no expectation of privacy on appellants' part and, therefore, a search in the constitutional sense did not occur. Maryland v. Macon (1985), 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370.

This same conclusion can be reached by applying the plain-view doctrine. Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. Since no First Amendment rights attached to the video booth activity, the plain-view doctrine was free of the constraints the Supreme Court has associated with freedom of speech and searches and seizures. Heller v. New York (1973), 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745. The evidence found was within the plain-view of anyone who entered the area of the bookstore. The bookstore was a place open to the public and, therefore, the deputies made their observations from a place where they were legally permitted to be.

State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals (1992), 63 Ohio St.3d 354, 364.

In the present case, the items collected by the officers, used tissues and paper towels, a used condom, and scrapings from the booths, were similar to the items collected by detectives without a warrant in Rear Door. As the court stated in Rear Door, these items are debris collected from a place open to any adult member of the public and in which appellants have no reasonable expectation of privacy. The Fourth Amendment does not protect against seizure of such items and the officers lawfully confiscated them without a warrant. See State ex rel. Ward v. Lion's Den (June 3, 1993), Ross App. No. 1874, unreported.

The plain-view doctrine is equally applicable herein as, like the evidence in Rear Door, the items seized from the Arcade were within plain view of those present in the Arcade. Also, as in Rear Door, the officers in the present case made their observations while in a place open to the public. See footnote 1, supra. Therefore, the officers' seizure of the items from the Arcade was also lawful under the plain-view doctrine.

Appellants, however, contend that the trial court erred in denying their motion to suppress on the basis that the exclusionary rule does not apply in civil cases. Appellants' position is that the exclusionary rule is "fully applicable to the quasi-criminal proceedings prescribed by Chapter 3767."

Once again, we find guidance in the Rear Door decision. The court in Rear Door determined that the fact that the case was a civil action added "further credence" to the overruling of the motion to suppress in that case. The court stated, "[g]enerally, the exclusionary rule has not been applied in civil cases; we see no reason to expand the exclusionary rule to the facts of this case." Rear Door at 364. Because the facts in the present case are so similar to the facts in Rear Door, we also see no reason to expand the exclusionary rule herein. Appellants' third assignment of error is overruled.

IV.

In their fourth assignment of error, appellants argue that the trial court was powerless to close the Arcade for all

purposes at the temporary injunction stage. Appellants propose that a "carefully tailored injunction" was required that simply ordered the conduct at issue abated. We do not agree.

R.C. 3767.04(B)(3), as it existed during the trial court proceedings in the present case, authorizes a court faced with an application for a temporary injunction in a nuisance action to "issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction."

As outlined above, the Arcade contained only video booths and a few game and vending machines. There is no indication that patrons visited the Arcade solely to

use the game and vending machines. In addition, upon review of the record, we find sufficient evidence that the operation of the arcade area played a significant part in the lewd conduct. We also fail to understand how an order requiring the lewd conduct in the Arcade to cease yet allowing the Arcade to operate would "assure the abatement of the nuisance," as appellants contend, especially in light of the trial court's finding that appellants had failed to abate the nuisance as of the temporary injunction hearing. The closure of the Arcade for all purposes at the temporary injunction phase was a proper application of R.C. 3767.04(B)(3). Accordingly, appellants' fourth assignment of error is overruled.

V.

In their fifth and final assignment of error, appellants allege "that the definitional and liability provisions of R.C. Chapter 3767 are unconstitutionally vague and overbroad." Appellants admit, however, that the Supreme Court of Ohio upheld the constitutionality of R.C. Chapter 3767 in Rear Door, supra. Based on that decision, we are obligated to reject appellants' constitutional challenges to R.C. Chapter 3767. See, also, State ex rel. Miller v. Private Dancer (1993), 83 Ohio App.3d 27. Appellants' final assignment of error is overruled.

Judgment affirmed.

KOEHLER, P.J., and WALSH, J., concur.

IN THE COURT OF COMMON PLEAS,
FAYETTE COUNTY, OHIO

STATE OF OHIO, ex. rel. JOHN ROSZMANN, Prosecuting Attorney of Fayette County	:	Case No. 920077 CIV
Plaintiff,	:	JUDGMENT ENTRY GRANTING PERMANENT INJUNCTION AND ORDER OF SALE
vs.	:	
LIONS DEN, et al.	:	
Defendants.	:	(Filed July 15, 1992)

This matter came on before the Court on the 29th day of June, 1992, upon the plaintiff's request for an injunction permanently enjoining the maintenance of nuisances in buildings located at 9021 and 9017 West Lancaster Road, Jeffersonville, Fayette County, Ohio, the Court have previously on April 10, 1992, at a hearing on plaintiff's Motion for a Temporary Injunction, found that the premises at 9021 and 9017 West Lancaster Road, Jeffersonville, Ohio, and occupied respectively by the

Lions Den Adult Book Store and the Interstate Adult Arcade, constituted nuisances as defined in Chapter 3767 of the Ohio Revised Code and the Court having previously ordered those premises closed pending hearing on the plaintiff's Motion for a Permanent Injunction, the Court further having allowed the Lions Den Adult Book Store to open upon the posting of bond and the payment of costs. At that time defendants, Lions Den Adult Book Store, Interstate Adult Arcade, Mid-West Pride IV, Inc., Interstate Independent Corporation, Real Properties, Michelle Robinette Moran, Frank E. Findo, Michael F. Moran, Jim Keaton, Betty Davis, Ricky Snyder, Gary Earles and Leslie Walp were represented by Attorneys J. Michael Murray and Jeremy A. Rosenbaum, Michael F. Moran and Michele Robinette Moran appearing personally. Defendant, Lawrence Brannon, while having

filed an answer, did not appear personally or appear represented by counsel. Plaintiff appeared represented by John H. Roszmann, Prosecuting Attorney of Fayette County, Ohio, and James B. Grandey, Prosecuting Attorney of Fayette County, Ohio. Also present on behalf of H.Q. Electronics who sought to intervene in the action, was Laura Peterman, Attorney at Law.

Upon the appearance of the parties and counsel, counsel for defendants moved the Court to quash subpoenas directed to defendant's, Michael F. Moran and Michele Robinette Moran and to Elmer Olson. At that time arguments were presented to the Court concerning the Motion to Quash and following a brief recess and further argument, the Court overruled the Motion to Quash.

At that time the parties stipulated that the record of the Permanent Injunction

hearing would be comprised of the entire record of the hearing on the plaintiff's application for Temporary Injunction including all testimony, exhibits, objections, arguments and rulings, together with any additional evidence and arguments presented by the parties and any additional rulings by the Court. The plaintiff then commenced the presentation of evidence and rested. The Court, having previously reserved ruling on the admission of plaintiff's exhibits, at that time and without any additional objections from the defendant, admitted all of the plaintiff's exhibits. Thereafter, counsel for the defendants moved the Court for a directed verdict as to plaintiff's claim that the Lions Den Book Store located at 9021 West Lancaster Road was a nuisance. The Motion was opposed by the plaintiff. Following arguments, the Court sustained the motion

of the defendants as to the Lions Den Adult Book Store located at 9021 West Lancaster Road and the Court hereby dismisses the action with prejudice as to defendants Ricky Snyder, Leslie Walp, Lions Den Adult Book Store, Mid-West Pride IV, Inc., and Real Property Located at 9021 West Lancaster Road, the Court finding that it does not constitute a nuisance subject to abatement pursuant to Chapter 3767 of the Revised Code. The defense then rested without presenting any evidence. Thereafter, arguments were presented concerning the nuisance at the Interstate Adult Arcade located at 9017 West Lancaster Road, Jeffersonville, Fayette County, Ohio.

The Court then coming on to consider the arguments of counsel, the evidence presented at hearing on the Motion for Temporary Injunction which was submitted by plaintiff as its evidence at the instant

hearing together with the evidence presented at the instant hearing, and specifically upon the admitted exhibits and the corroborating testimony with respect thereto, found and hereby finds by clear and convincing evidence that a nuisance existed at the time of the filing of the Complaint herein at the Interstate Adult Arcade at 9017 West Lancaster Road, Jeffersonville, Fayette County, Ohio. It is therefore the order of the Court that a Permanent Injunction be, and the same hereby is, issued enjoining defendants Gary Earles, Betty Davis, Jim Keaton, Michael F. Moran and Interstate Independent Corporation from maintaining or conducting a nuisance at the Interstate Adult Arcade located at 9017 West Lancaster Road, Jeffersonville, Fayette County, Ohio, and it is the further order of the Court that Interstate Adult Arcade be closed for a period

of one (1) year from the date of this Entry and that a tax pursuant to § 3767.08 of the Revised Code in the sum of $300.00 be, and hereby is, assessed against Lawrence Brannon the owner of the real property located at 9017 West Lancaster Road, Jeffersonville, Ohio and against Interstate Independent Corporation. It is further ordered, upon the Court's finding that the record does not establish by clear and convincing evidence that the remaining named defendants are proper and/or culpable parties, that this action be, and hereby is, dismissed with prejudice as to Interstate Adult Arcade, Real Property located at 9017 West Lancaster Road, Frank E. Findo and Michele Robinette Moran.

It is the further order of the Court that pursuant to § 3767.06 of the Revised Code all personal property located at the Interstate Adult Arcade including, but not

limited to, all video cassette recorders, all television monitors, all booths, all wiring and any and all other personal property used in the conduct and maintenance of the nuisance herein found be sold pursuant to the statutes of the State of Ohio as upon execution and that the proceeds thereof be distributed according to law. And it is the further order of the Court that an order of sale of the personal property located in the Interstate Adult Arcade at 9017 West Lancaster Road, Jeffersonville, Fayette County, Ohio, as described herein, directed to the Sheriff of Fayette County, Ohio, issue forthwith.

Upon argument and agreement of counsel for plaintiff, defendants and Movant, H.Q. Electronics, the Motion of H.Q. Electronics to intervene in these proceedings was, and hereby is, denied without prejudice to its or anyone's right to apply and claim

entitlement to the return of personal property located at the Interstate Adult Arcade after the entry of this Judgment.

It is further ordered that the Temporary Restraining Order and the Temporary Injunction heretofore issued by this Court be, and the same hereby are, dissolved.

/s/
OMAR A. SCHWART, JUDGE

APPROVED AS TO FORM:

/s/
J. Michael Murray

/s/
Jeremy Rosenbaum
Attorneys for Lions Den Adult Book Store, Interstate Adult Arcade, Mid-West Pride IV, Inc., Interstate Independent Corporation, Real Properties, Michelle Robinette Moran, Frank E. Findo, Michael F. Moran, Jim Keaton, Betty Davis, Ricky Snyder, Garyl Earles and Leslie Walp

/s/
John H. Roszmann, Prosecuting Attorney

/s/
James B. Grandey, Assistant
Prosecuting Attorney

IN THE COURT OF COMMON PLEAS,
FAYETTE COUNTY, OHIO

STATE OF OHIO, ex rel. JOHN H. ROSZMANN,	:	Case No. 920077 CIV
Plaintiff,	:	
	:	JUDGMENT ENTRY
vs.	:	
	:	(Filed
LIONS DEN, et al.	:	April 10, 1992)
Defendants.	:	

Upon hearing before the Court on April 9 and 10, 1992, regarding the maintenance of a nuisance on the premises at 9017 and 1021 W. Lancaster Road, Jeffersonville, Ohio, the Court finds that a nuisance exists upon said premises, in that the premises is a place in or upon which lewdness is conducted, permitted, continued or exists. The Court finds that a copy of the Amended Complaint, together with notice of the time and place of hearing of the application for a temporary injunction was served upon all necessary parties at least five (5) days

prior to hearing of was waived. The Court further finds that the defendants have not satisfactorily abated the nuisance.

It is THEREFORE, ORDERED AND ADJUDGED, that in accordance with the provisions of Section 3767.04 O.R.C., the premises at 9017 and 9021 West Lancaster Road, Jeffersonville, Ohio, are temporarily enjoined, and are hereby ordered closed. Such order shall continue in effect until final decision is rendered on Plaintiff's application for permanent injunction, or until the Court finds that the nuisance has been abated. It is the FURTHER ORDER OF THE COURT that upon the posting of a bond in the sum of $90,000.00 with the Clerk of this Court, the premises at 9021 West Lancaster Road, Jeffersonville, Ohio, may remain open pending further order of the Court.

Dated: April 10, 1992

_____

Omar A. Schwart,
Judge

IN THE COURT OF COMMON PLEAS,
FAYETTE COUNTY, OHIO

STATE OF OHIO, ex rel. JOHN H. ROSZMANN Prosecuting Attorney of Fayette County, Ohio 132 1/2 E. Court Street Washington C.H., Ohio 43160	: Case No. 920077 CIV
Plaintiff,	
vs.	: TEMPORARY RESTRAINING ORDER
LIONS DEN, et al.,	(Filed March 13, 1992)
Defendants.	

Based upon the allegations contained in the verified Complaint filed herein by the plaintiff and pursuant to §3767.04 of the Revised Code, the Court responds as follows:

The Court finds that the personal property and contents of the premises described in the Complaint, namely the Lions Den and Interstate Adult Arcade located at 9017 and 9021 West Lancaster Road NW, Jeffersonville, Fayette County, Ohio, constitute

evidence of the alleged nuisances as set forth in the verified Complaint and therefore the removal of such property or contents during the pendency of this action would constitute immediate and irreparable injury to the plaintiff and that there is reason to issue a Temporary Restraining Order restraining the defendants and others from removing personal property or contents of the premises. The Court further finds that the issuance of such Temporary Restraining Order is permissible ex parte under Chapter 3767 of the Revised Code.

It is therefore the order of the Court that none of the defendants herein, nor any other person, shall remove or in any manner interfer[sic] with the personal property or contents located in the premises described in the verified Complaint herein, viz: the Lions Den and Interstate Adult Arcade located at 9017 and 9021 West Lancaster

Road NW, Jeffersonville, Fayette County, Ohio, until the decision of this Court upon plaintiff's application for Temporary Injunction or until further order of the Court.

It is the further order of the Court that the Sheriff of Fayette County, Ohio, or his duly authorized deputies, shall serve a certified copy of this order upon any person in charge of the premises described herein and shall post certified copies of this order in conspicuous places at or upon one or more of the principal doors or entrances or such places.

It is the further order of the Court that the Sheriff of Fayette County, Ohio, or his duly authorized deputies, shall make and return to this Court inventory of the personal property and contents of the premises described herein which are used in conducting and maintaining the nuisance

alleged. It is the further order of the Court that the contents of the premises constitute evidence of the alleged nuisance and may be photographed and/or scientifically tested during the inventory ordered herein.

It is the further order of the Court that while this order remains in force, any violation or any removal or mutilation of this order when posted, is an act in contempt of court.

APPROVAL:

John H. Roszmann
Prosecuting Attorney of
Fayette County, Ohio

/s/
James B. Grandey
Assistant Prosecuting Attorney
Fayette County, Ohio
Supreme Court #0006249

/s/
OMAR A. SCHWART, JUDGE

CONSTITUTION OF THE UNITED STATES

First Amendment

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State who, having pre-

viously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law; including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF OHIO

Article 1, Section 11

§ 11 Freedom of speech and of the press; libel.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted. (See Const. 1802, Art. VIII, § 6.)

CONSTITUTION OF OHIO

Article 1, Section 14

§ 14 Search warrants and general warrants.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized. (See Const. 1802, Art. VIII, § 5.)

Ohio Revised Code
(Page's 1988)

§ 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in

negative or positive form designed for exhibition by projection on a screen are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

Ohio Revised Code
(Page's 1988)

§ 3767.02 Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.03 Abatement of nuisance; bond.

Whenever a nuisance exists, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists; the prosecuting attorney of the county in which the nuisance exists; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the prosecuting attorney, or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it. If an action is instituted under this section

by a person other than the prosecuting attorney; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; or the attorney general, the complainant shall execute a bond in the sum of not less than five hundred dollars, to the defendant, with good and sufficient surety to be approved by the court or clerk of the court, to secure to the defendant any damages he may sustain and the reasonable attorney's fees he may incur in defending the action if the action is wrongfully brought, not prosecuted to final judgment, is dismissed, or is not maintained, or if it is finally decided that an injunction should not have been granted. If it is finally decided that an injunction should not have been granted or if the action was wrongfully brought, not prosecuted to final judgment, dismissed, or not maintained, the

defendant shall have recourse against the bond for all damages suffered, including damages to his property, person, or character, and for the reasonable attorney's fees incurred by him in defending the action.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.04 Procedure in injunction action.

(A) The civil action provided for in section 3767.03 of the Revised Code shall be commenced in the court of common pleas of the county in which the nuisance is located. At the commencement of the action, a complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

(B)(1) After the filing of the complaint, an application for a temporary injunction may be filed with the court or a judge of the court. A hearing shall be held on the application within ten days after the filing.

(2) If an application for a temporary injunction is filed, the court or a judge of the court, on application of the complainant, may issue an ex parte restraining

order restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist until the decision of the court or judge granting or refusing the requested temporary injunction and until the further order of the court. The restraining order may be served by handing it to and leaving a copy of it with any person who is in charge of the place where the nuisance is alleged to exist or who resides in that place, by posting a copy of it in a conspicuous place at or upon one or more of the principal doors or entrances of that place, or by both delivery and posting. The officer serving the restraining order forthwith shall make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining the

nuisance. Any violation of the restraining order is a contempt of court, and, if the order is posted, its mutilation or removal while it remains in force is a contempt of court, provided the posted order contains a notice to that effect.

(3) A copy of the complaint, a copy of the application for the temporary injunction, and a notice of the time and place of the hearing on the application shall be served upon the defendant at least five days before the hearing. If the hearing then is continued on the motion of any defendant, the requested temporary injunction shall be granted as a matter of course. If, upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other per-

son from continuing the nuisance. Except as provided in division (C) of this section, if at the time of granting the temporary injunction it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless that person shows to the satisfaction of the court or judge that the nuisance complained of is abated or that he proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge forthwith shall issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until a final decision is rendered on the complaint for the requested permanent injunction. Except as provided in division (C) of this section, the order closing the place also shall continue in effect for that further period any re-

straining order already issued under division (B)(2) of this section, or, if a restraining order was not so issued, the order closing the place shall include an order restraining for that further period the removal or interference with the personal property and contents located in the place. The order closing the place shall be served and an inventory of the personal property and contents situated in the place shall be made and filed as provided in division (B)(2) of this section for restraining orders.

(C) The owner of any real or personal property closed or to be closed or restrained may appear in the court of common pleas between the time of the filing of the complaint for the permanent injunction described in division (A) of this section and the hearing on the complaint, and, if all costs incurred are paid and if the

owner of the real property files a bond with sureties approved by the clerk, in the full value of the real property as ascertained by the court, or, in vacation, by the judge, and conditioned that the owner of the real property immediately will abate the nuisance and prevent it from being established or kept until the decision of the court or judge is rendered on the complaint for the permanent injunction, the court or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of the personal property as a nuisance and that, with reasonable care and diligence, the owner of the personal property could not have known of its use as a nuisance, shall deliver the real or personal property, or both, to the respective owners and discharge or refrain

from issuing at the time of the hearing on the application for the temporary injunction any order closing the real property or restraining the removal or interference with the personal property. The release of any real or personal property, under this division shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.05 Priority of action; evidence; costs.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is

filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action,

the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and another person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.06 Order of abatement; removal of personal property and contents; attorney general nuisance abatement fund.

(A) If the existence of a nuisance is admitted or established in the civil action provided for in section 3767.03 of the Revised Code, or in a criminal action, an order of abatement shall be included in the judgment entry under division (D) of section 3767.05 of the Revised Code. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at a public

auction to the highest bidder for cash. The order also shall require the renewal for one year of any bond furnished by the owner of the real property under section 3767.04 of the Revised Code; if a bond was not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction; or, if a closing order was not then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may appear and obtain a release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of property under this division shall not release it from any judgment, lien,

penalty, or liability to which it may be subject.

(B) Owners of unsold personal property or contents seized pursuant to division (A) of this section shall appear and claim the personal property within ten days after the order of abatement is issued and prove to the satisfaction of the court their lack of any actual knowledge of the use of the personal property or contents in the conduct or maintenance of the nuisance and that with reasonable care and diligence they could not have known of that use. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place where the nuisance is found to exist. If an owner establishes the lack of actual or constructive knowledge of the use of his personal property or contents in the conduct or maintenance of the nuisance, the unsold

personal property or contents shall be sold or otherwise disposed of as provided in division (A) of this section. For removing and selling the personal property and contents, the officer involved shall be entitled to charge and receive the same fees as he would for levying upon and selling similar property on execution. For closing the place where the nuisance is found to exist and keeping it closed, a reasonable sum shall be allowed by the court.

(C) There is hereby established in the state treasury the attorney general nuisance fund. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, all proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted by the attorney general under sections 3767.03 to 3767.11 of the Revised Code shall be deposited into the

state treasury and credited to the fund. The attorney general shall use the fund solely to defray expenses and costs associated with those types of civil actions.

(D) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a village solicitor, city director of law, or other similar chief legal officer of a municipal corporation initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to

3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the city or village treasury and credited to the general fund.

(E) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a prosecuting attorney initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application

shall be deposited into the county treasury and credited to the general fund.

(F) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced under sections 3767.03 to 3767.11 of the Revised Code by a person who is a citizen of the county where the nuisance is found to exist initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into

the county treasury and credited to the general fund.

Supreme Court, U.S.
FILED
APR 19 1994
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(2)

No. 93-1512

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE INDEPENDENT CORPORATION
GARY EARLES; BETTY DAVIS; JIM KEATON;
MICHAEL MORAN,

Petitioners,

vs.

STATE OF OHIO, EX REL, JOHN ROSZMANN,
Prosecuting Attorney for
Fayette County, Ohio,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I. Is public masturbation and sexual intercourse for the purpose of sexual gratification, done while watching a sexually explicit videotape, to be considered expressive conduct or so intimately related with expressive conduct as to warrant First Amendment protection and thus review under *United States v. O'Brien*?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Ohio, ex rel. John H. Roszmann respectfully requests this Court to deny the petition for a writ of certiorari seeking review of a decision of the Supreme Court of the State of Ohio.

STATEMENT OF THE CASE

Undercover officers from the Fayette County, Ohio Sheriff's Department and the South Central Ohio Task

Force visited the Petitioner's Videotape Arcade on several occasions from January 1992 through March 1992. Upon entering the facility, the officers encountered a desk where an employee checked membership cards. During their initial visit, the investigators obtained a membership after producing identification, signing a form and paying a one dollar fee. Also located in the entrance area are a change machine and a cashier.

The remainder of the facility's physical layout consists of a game and vending area and an arcade area. The arcade area contains thirty-two viewing booths with doors that closed and latched, similar in construction to a public restroom stall. Each booth is equipped with a bench, a menu of sexually explicit videos, and a coin-activated monitor for viewing the videos. The video monitors operate only if the booth's door is closed and latched.

During their visits to the Arcade, the officers collected used tissues, paper towels and a used condom from the floor of the various booths. Also, an officer used a cotton-tipped swab to collect a sample of a white substance he observed in one of the booths. Forensic testing of the tissues and paper towels revealed the presence of semen and pubic hairs. The condom and the cotton swab also contained traces of semen. In addition, the officers observed what appeared to be dry semen stains on the walls, floors and video monitors of the booths. Use of a blacklight confirmed the presence of these stains.

The officers reported that the area was not particularly clean and that the floors of the booths were "sticky." They also described the presence of employees

referred to as "cleaners" who wore rubber gloves, swept and mopped the floors and collected paper towels and tissues from the booths and adjoining hallway.

The arcade has no retail merchandise available for sale; however, all sexually explicit videos shown in the Arcade are sold in the Lion's Den Adult Bookstore, located in a separate structure adjacent to the Arcade. The Lion's Den Adult Bookstore is not involved in this Petition.

Respondent, John Roszmann, former Fayette County Prosecuting Attorney, filed a nuisance complaint against the owners and operators of the Arcade pursuant to Ohio Revised Code Chapter 3767 on March 13, 1992. The complaint alleged the Arcade to be a public nuisance as "lewdness, assignation or prostitution is conducted, permitted, continued or exists" on the premises. The trial court denied appellants' motions for dismissal and suppression of evidence. Thereafter, the court heard evidence on the state's motions for temporary and permanent injunctions. The court issued a temporary injunction on April 10, 1992 and a permanent injunction on July 15, 1992. The final order enjoins appellants from conducting a nuisance at the Arcade, orders the Arcade closed for one year and requires the sale of all personal property used in conducting the nuisance. To all of this the Petitioners appealed to the Supreme Court from the State of Ohio which denied certiorari on December 29, 1993, as no substantial constitutional question exists therein. From these proceedings the Petitioners apply to this Court for a Writ of Certiorari to the Ohio Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners seek review of issues already decided by this Court. Specifically they ask this Court to review its decision in *Arcara v. Cloud Books, Inc.* to require application of First Amendment scrutiny. Thereby requiring, in theory, the application of the stricter scrutiny of the *O'Brien* four-part test, specifically that of step four the "least restrictive means" test. Petitioners attempt to do so by stating that the arguments of the dissent in *Cloud Books, Inc,* have not been adequately disposed of by the majority opinion. Closer inspection reveals the majority in *Cloud Books, Inc.* disposed of the same argument at footnote three of its opinion, when it stated " . . . the 'nonspeech' conduct subject to a general regulation bears absolutely no connection to any expressive activity." *Id.* at fn 3. Therefore the issuance of a writ is inappropriate in this case.

I.

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY PETITIONERS.

The Petitioners attempt to say the holding in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), does not presently extend to the factual situation presented here and therefore the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968) must be applied to the facts of this case. Arguably, this would have the effect of requiring the State to impose the least restrictive means available to stop the improper conduct of the patrons in this case instead of the one-year closure sanction that was imposed. This one assumption is central to Petitioners' entire argument, as

to find against it on this point makes its entire argument moot.

The case of *Cloud Book, Inc.* was to decide the issue of whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution *and* lewdness because the premises are also used as an adult bookstore. *Id.* at 698. The Court concluded " . . . the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books." *Id* at 707. The "adult bookstore" in that case sold sexually explicit books and magazines *with* booths available for the viewing of sexually explicit movies. Deputy Sheriffs observed conduct on the premises that included masturbation, fondling and fellatio by patrons. They also observed instances of solicitation of prostitution and were themselves solicited on at least four occasions. A complaint was brought seeking closure of the premises under New York states public health law which would allow closure for up to one year. Respondents answered the complaint by denying the allegations and asserting that the closure sought would impermissibly interfere with their First Amendment right to sell books on the premises. The trial court rejected the Respondents' First Amendment claim. The Appellate Division affirmed, but the New York Court of Appeals reversed, finding the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), was the standard that should have been applied. This Court granted certiorari.

This Court found the four-part test of *O'Brien* was not the standard to apply in *Cloud Books, Inc.* as there was no First Amendment issue to be resolved. The Court

found the Respondents did not even have a semblance of expressive activity in their claim nor were the speech and nonspeech elements combined in the same course of conduct. The Defendant in the prior case of *O'Brien*, had, on the other hand, established that his action in burning his draft card was done to "carry a message," which the Court found to be an important element. If he had not done so the destruction of the draft card would not have been expressive conduct. The Court found there must be expressive activity or "speech" to impose the test or there must be speech and nonspeech elements combined in the same course of conduct to warrant incidental limitations on First Amendment freedoms. In *Cloud Books, Inc.*, the legislation involved was directed at unlawful conduct having nothing to do with books or other expressive activity. The Court, therefore, concluded *O'Brien* had no relevance to a statute directed at imposing sanctions on this non-expressive activity.

Neither did the Court in *Cloud Books, Inc.* find the test in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, to apply to the facts presented. In *Minneapolis Star* a special use tax on publications, assessing the tax on the cost of the ink and paper used in producing the publications was found to single out the press. The Court found that singling out the press for special treatment was a violation of the First Amendment unless the tax was necessary to achieve an overriding governmental interest. The differential tax placed such a burden on the interests protected by the First Amendment that the Court could not countenance such treatment unless the state asserted a counterbalancing interest

of compelling importance that it could not achieve without the tax. Since Minnesota had offered no satisfactory justification the tax was found to violate the First Amendment rights of those taxed. The Court in *Cloud Books, Inc.* found the test in *Minneapolis Star* to be likewise inapplicable to the facts presented and held the First Amendment was not implicated by the enforcement of a public health regulation of general application in which Respondents happen to sell books.

The Court of Appeals for Fayette County, Ohio, found the Petitioners' First Amendment contentions in this case to be similarly without merit. It interpreted least restrictive means scrutiny to apply only to those civil and criminal sanctions where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where the statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*, which is the standard set forth in *Cloud Books, Inc.* at 706-707. The state appellate court found neither justification for "least restrictive means" scrutiny to exist in this case.

Like *Cloud Books, Inc.*, the sexual activity found to have occurred in this case contains no significant element of expression protected under the First Amendment. The Supreme Court of Ohio has held that sexual activity in an adult bookstore does not involve elements of protected speech. *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio St.3d 354, 588 N.E.2d 116. This is on comport with this Court's decision in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, where the Court underscored the fallacy of seeking to use the First

Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. Here the nonspeech conduct is not even closely combined with the speech element. As was indicated before, the persons engaging in showing the videotapes were not the same persons who were engaging in the sexual activity. Petitioners showed the tapes but their clientele engaged in the sexual activity. The only connection between the tapes and the sexual activity was that the Petitioners permitted the sexual activity to occur. Therefore the *O'Brien* test does not apply to the facts of this case as it only applies to conduct with a significant expressive element.

Likewise the state appellate court found the *Minneapolis Star* test not to apply. Masturbation and sexual intercourse is not so inextricably bound up with or intimately related to the display of adult videotapes and movies that the conduct cannot be regulated separately from the protected speech. Nor does the Ohio Revised Code Chapter 3767 have the inevitable effect of singling out expressive activity, as it forbids "lewdness, assignation, or prostitution", as did the statute in *Cloud Books, Inc.*

The true holding of *Cloud Books, Inc.* as stated by the Court was, "We conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books." *Arcara v. Cloud Books, Inc.* at 707. Thereby finding the legislation in that case to involve neither the *O'Brien* nor the *Minneapolis Star* standards.

II.

THE PETITIONERS ATTEMPT TO NARROW THE SCOPE OF *CLOUD BOOKS, INC.*

The Petitioners offer three distinctions between their factual pattern and that found in *Cloud Books, Inc.* to support their petition. First, the conduct occurring on the premises was not illegal. Second, the conduct did not occur in public. Third, the conduct was intimately related to expressive conduct which is protected under the First Amendment. The Petitioners attempt to narrow the scope of *Cloud Books, Inc.* in hopes of obtaining a Writ of Certiorari.

First, they say the offensive conduct here was unlike that in *Cloud Books, Inc.* as the acts were not criminal in nature. The Petitioners allege the *Cloud Books, Inc.* decision only applies where there is criminal activity, such as prostitution, which is not present in their case. In *Cloud Books, Inc.* there is no indication the opinion is limited to that narrow of a scope. In fact, the action brought by the District Attorney was a civil action as provided by statute. There is nothing in the record to indicate the individuals involved in the public sexual activity in *Cloud Books, Inc.* were ever arrested or prosecuted for the offenses of soliciting to prostitution, lewdness, public indecency or any other offense according to the factual pattern of the case. Indeed, this was never a prerequisite in the New York statute to the successful enforcement of a nuisance suit, it is simply an alternative method as provided by that statute. The fact that *Cloud Books, Inc.* involved prostitution was only incidentally important to the decision of

the case as the holding above indicates. It was the general application of a public health regulation that was at issue. That public health regulation imposed the same sanctions for lewdness, assignation, or prostitution, all of which were present in the case. *Cloud Books, Inc.* simply does not hold that there must be a prior finding of criminal conduct to bring a successful nuisance suit. It only requires that the conduct must be of a nature as prohibited by the nuisance statute. In the instant case, the action of public masturbation or sexual conduct for sexual gratification was adequately proven by evidence at the hearing on the permanent injunction of the nuisance suit.

Second, the Petitioner claims the sexual acts did not occur in public but in private viewing booths. This completely ignores the finding of the Appellate Court that the conduct here was public sexual activity. From photographs and a videotape of the Arcade, the court found the individual booths resemble public restroom stalls. Neither the partitions separating the booths nor the doors to the booths reach the floors. It was clear to the Appellate Court that the space left open was sufficient for a passerby to at least in part observe the activities of a patron or patrons inside an individual booth. Because partitions between the booths do not reach the floor, a patron in one booth could conceivably at least observe the activities of patrons in adjoining booths. Because the booths in the Arcade and those in public restrooms are structurally similar and both are partitioned spaces within a place accessible to the public, the right to privacy in public restrooms is applicable to this case.

The Appellate Court found there is no expectation of privacy in a public restroom unless 1) the individual has

a subjective expectation of privacy and 2) the expectation must, as an objective matter, be one that society is prepared to recognize as reasonable. The Court stated that an individual cannot reasonably expect privacy when using a public restroom for a purpose other than that which the stall was intended. Likewise, a patron of the Arcade cannot reasonably expect privacy while inside one of the Arcade's booths if they utilize the booth for sexual activity, as most adults employing their senses and experience in combination with what can be observed beneath the booths and partitions could ascertain whether sexual activity was taking place inside one of the booths. Also, society is not prepared to tolerate an expectation of privacy legitimizing sexual activity in a partially enclosed booth within an arcade accessible to the public, especially in light of the public health concerns involved. The sexual activity therefore occurred in an area where no right to privacy existed. Stated another way, the activity was "public" for purposes of the definition of lewdness, that is, public sexual activity that is reprehensible or disgusting in nature.

Third, the Petitioner attempts to say the sexual acts conducted on the premises were inextricably bound, or intimately related, to the expressive conduct, i.e. the playing of the sexually explicit videotapes. Thereby referring to the third footnote of *Cloud books, Inc.* where the majority sets straight the difference between that case and those the dissenting opinion attempts to use to criticize the majority opinion.

The Petitioners attempt to use *Cloud Books, Inc.* to apply a proposition of law that has been refuted by the majority in *Cloud Books, Inc.* In Petitioners brief at page 6

they cite *Cloud Books, Inc.*, at 703-704, to stand for the proposition that *O'Brien* applies to conduct inextricably intertwined with or intimately related to speech. That standard is set forth at footnote three where the majority disposes of it on the same grounds as the Respondent sets forth here, the nonspeech conduct subject to the general regulation bears absolutely no connection to any expressive activity.

The cases cited by Petitioners in support of their position here stand for nothing even remotely close to the facts of this case. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the demonstrators were also the persons who sought to sleep in the public park. In *United States v. Albertini*, 472 U.S. 675 (1985), those barred from the military base were also the protestors. Thereby giving credence to the protestors and demonstrators statement that their prohibited conduct contained an expressive element and requiring analysis of their conduct under the *O'Brien* test. In the instant case, the speech element is being conducted by the Petitioners and the regulated nonspeech element is being conducted by their audience. There is no credible evidence the sexual acts contained any expressive element or were done in the same course of conduct as that of the expressive conduct. Thereby asserting at best the standard required by *Minneapolis Star*, which the Court has stated does not apply either.

The cases, therefore, divide themselves into two groups. One which must pass the four-part test of *O'Brien* and another which must pass the test of *Minneapolis Star*.

But both of these tests apply only if there is an implication of the First Amendment. The Court has stated, however, in its holding in *Cloud Books, Inc.*, the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which Respondents happen to sell books. There is no need to revisit the grounds the Court used to decide *Cloud Books, Inc.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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